**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation

Mater File No. 1:00-1898
MDL 1358 (SAS)
M21-88
ECF Case

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**This document relates to the following case:**

*Yosemite Springs Park Utility Company v. Chevron, U.S.A. Inc., et al.,* Case No. 09-CIV-1419

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**CHEVRON U.S.A. INC.'S RESPONSE TO PLAINTIFF YOSEMITE SPRINGS PARK UTILITY COMPANY'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OR ARGUMENT THAT PLAINTIFF RECEIVED COMPENSATION FOR ITS INJURY FROM A COLLATERAL SOURCE**

## TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................ 1

II. THE EVIDENCE AT ISSUE ........................................................................................ 2

III. YSPUC'S MOTION IN LIMINE IS PREMATURE, AND THIS COURT SHOULD DEFER TO THE TRIAL COURT UPON REMAND ........................................................................ 4

IV. THE DWTRF EVIDENCE IS ADMISSIBLE. ................................................................. 6

A. The DWTRF Evidence is Admissible for Other Valid Purposes. ..................................... 6

1. The DWTRF Evidence is Relevant to a Number of Contested Issues ........................... 8

a. The DWTRF Evidence Establishes the Costs YSPUC Incurred ................................ 8

b. The DWTRF Determined Certain Costs of the Plant Were Not Reasonable ........... 10

c. The DWTRF Drove YSPUC's Design Decisions for the Plant................................ 12

d. YSPUC Made Certain Relevant Representations in its Application to the DWTRF 13

e. The DWTRF Evidence is Relevant to YSPUC's Punitive Damages Claim............. 14

2. The DWTRF Evidence Is Relevant (and Admissible) to Impeach YSPUC Witnesses.15

B. Payments to the DWTRF Are Not Subject to the Collateral Source Rule, and Are Thus Admissible. ..................................................................................................... 17

V. ANY RULING ON A MOTION IN LIMINE SHOULD NOT PROHIBIT CHEVRON'S PROPER DISCOVERY............................................................................................. 21

VI. CONCLUSION.......................................................................................................... 22

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

*Coursen v. A.H. Robins Co.*,
764 F.2d 1329 (9th Cir. 1985) ....................................................................................5

*Dollar v. Long Mfg., N.C., Inc.*,
561 F.2d 613 (5th Cir. 1977) ......................................................................................7

*Dorn v. Burlington N. Santa Fe RR Co.*,
397 F.3d 1183 (9th Cir. 2005) ....................................................................................16

*Duc Van Nguyen v. Shalala*,
1994 WL 362263 (N.D. Cal. Feb. 1, 1994) .................................................................16

*England v. Reinaur Transp. Co., L.P.*,
194 F.3d 265 (1st Cir. 1999).........................................................................................6

*Fitzgerald v. Expressway Sewerage Const. Inc.*,
177 F.3d 71 (1st Cir. 1999)...........................................................................................6

*In re Multidistrict Civil Actions Involving Air Crash Disaster*,
386 F. Supp. 908 (Jud. Pan. Mult. Lit. 1975) ...............................................................5

*In re Nuvaring Products Liability Litigation*,
2009 WL 4825170, No. 4:08MD1964 RWS (E.D. Mo. Dec. 11, 2009) .....................................5

*Jonasson v. Lutheran Child & Family Servs.*,
115 F.3d 436 (7th Cir. 1997) ......................................................................................4

*King v. City of New York*,
2007 WL 1711769, No. 06 Civ. 6516 (SAS), at *1 (S.D.N.Y. June 13, 2007).........................6

*McGrath v. Consolidated Rail Corp.*,
136 F.3d 838 ...............................................................................................................16

*McQuade v. Michael Gassner Mechanical & Elec.*,
587 F.Supp. 1183 (D. Conn. 1984)..............................................................................22

*Perry v. Ethan Allen, Inc.*,
115 F3d 143 (2nd Cir. 1997)..........................................................................................7

*Quintero v. United States*,
2010 WL 5071045, No. 1:08-cv-01890-OWW-SMS, at * 7 (E.D. Cal. Dec. 7, 2010).......7, 10

*Sperberg v. Goodyear Tire & Rubber Co.*,
519 F.2d 708 (6th Cir. 1975) ....................................................................................5

*Starling v. Union Pac. R.R.*,
203 F.R.D. 468 (D. Kan. 2001)....................................................................................5

*Timmons v. UPS, Inc.*,
2010 WL 2464869 (E.D. Cal. June 14, 2010) ....................................................................6, 13

*U.S. ex rel Schwartz v. TRW, Inc.*,
211 F.R.D. 388 (C.D. Cal. 2002)....................................................................................22

*U.S. v. Meyer*,
398 F.2d 66 (1968)....................................................................................22

*U.S. v. Miranda-Uriarte*,
649 F.2d 1345 (9th Cir. 1981) ....................................................................................7

**STATE CASES**

*Arambula v. Wells*,
72 Cal. App. 4th 1006 (1999) ....................................................................6, 15, 18

*Cabrera v. E. Rojas Props., Inc.*,
2011 WL 386840 (Cal. Ct. App. Feb. 8, 2011) ....................................................................20

*Hanif v. Housing Authority*,
200 Cal.App.3d 635 (1988) ....................................................................................8

*Helfend v. S. Cal. Rapid Transit Dist.*,
2 Cal. 3d (1970) ....................................................................................20

*Howell v. Hamilton Meats & Provisions, Inc.*,
2011 WL 3611940, No. S179115, at *1 (Cal. Aug. 18, 2011) ............................8, 9, 17, 20, 21

*Maggio, Inc. v. Un. Farm Workers of Am., AFL-CIO*
227 Cal. App. 3d 847 (1991) ....................................................................................18

*McKinney v. Cal. Portland Cement Co.*,
96 Cal. App. 4th 1214 (2002) ....................................................................15, 17

*McQuillian v. S. Pac. Co.*,
40 Cal. App. 3d 802 (1974) ....................................................................................18

*Philip Chang & Sons Assoc. v. La Casa Novato*,
177 Cal. App. 3d 159(1986) ....................................................................................18

*Smalley v. Baty*,
128 Cal. App. 4th 977 (2005) ....................................................................................10

*Smock v. State*,
41 Cal. Rptr. 3d 857 (2006) ....................6, 17

**STATE STATUTES**

CAL. CIV. CODE § 3359 ....................10

CAL. HEALTH & SAFETY CODE §§ 25299.10, 25299.30 ....................18

CAL. HEALTH & SAFETY CODE § 25299.31 ....................19

CAL. HEALTH & SAFETY CODE § 25299.99(a) (1998) ....................19

**RULES**

FED. R. CIV. P. 26(b) ....................22

FED. R. EVID. 401 ....................7, 10

FED. R. EVID. 402 ....................7, 22

FED. R. EVID. 607 ....................15

FED. R. EVID. 608 ....................15

## I. INTRODUCTION

The Court need not reach the issue raised by Plaintiff Yosemite Springs Park Utility Company ("YSPUC") that the evidence at issue is inadmissible under the collateral source rule. The evidence at issue is highly relevant and clearly admissible for a variety of reasons discussed herein. At time of trial, the trial court can consider what, if any, limiting instruction should be given to the jury. But even if the Court were to evaluate YSPUC's request under the collateral source rule, the Court should deny it under clear California law. California law does not permit the double recovery YSPUC seeks here, especially when the funds in question are not wholly independent from Defendant Chevron U.S.A. Inc. ("Chevron"). Indeed, Chevron—not YSPUC—contributed to the source of funding at issue here; therefore, the payments at issue are not from a "collateral source."

Importantly, the Drinking Water Treatment & Research Fund ("DWTRF") did much more than pay for the MTBE treatment plant (the "Plant") YSPUC installed. The employees of the DWTRF interacted with YSPUC in every facet of designing, constructing, and later managing the Plant for which YSPUC now seeks damages from Chevron. YSPUC relied exclusively on the DWTRF to determine whether costs were reasonable and necessary, and YSPUC specifically limited its liability to its contractor to amounts paid by the DWTRF. And YSPUC submitted what the DWTRF manager determined were "fraudulent" invoices in the hopes of obtaining more funding. But now, YSPUC seeks to exclude all evidence of the DWTRF, and necessarily YSPUC's relationship with it, under the guise of a motion in limine based on the collateral source rule. YSPUC's Motion—brought long before any trial setting and in the middle of discovery—is nothing more an attempt to get rid of critical and relevant injury evidence that will belie its claims related to the Plant and whether those costs were reasonable, necessary, and even incurred. And YSPUC even seeks as damages money it paid to the DWTRF for program management, yet it seeks to exclude Chevron from putting on evidence of those payments, why the DWTRF incurred greater than necessary costs managing YSPUC's incompetent agent, and other relevant evidence. The relief YSPUC now seeks is simply unworkable and would fundamentally lead to an unfair trial.

In any event, YSPUC's Motion is both procedurally improper and substantively meritless. First, YSPUC brings this Motion long before trial (the proper time for a motion in limine) and before the all of the facts in this case have fully developed. Second, the collateral source rule does not bar evidence related to the DWTRF, when offered for another purpose. This evidence is highly probative in this case, and should be admitted for a variety of case-specific reasons, including its relevance to prove (1) the costs incurred by YSPUC; (2) whether those costs were not reasonable; (3) YSPUC's motivation for selecting the system it did/whether it mitigated its damages; (4) YSPUC's representations concerning the alleged contamination; (5) YSPUC's representations concerning the Plant; and (6) YSPUC's punitive damages claim. The DWTRF is also highly probative to impeach YSPUC witnesses on issues related to the design and construction of the Plant. And finally, the collateral source rule does not even apply to the DWTRF because Chevron is a contributor to the DWTRF, and thus the DWTRF is not "independent" of Chevron. The Court should deny YSPUC's Motion because it is both premature and wholly without merit.

## II. THE EVIDENCE AT ISSUE

It is unclear what YSPUC would like to exclude with its Motion. Initially, YSPUC argues that its receipt of funding from the DWTRF "cannot be referred to or put into evidence for the jury's consideration under the collateral source rule." Mtn. at 1. In its conclusion, YSPUC asks the Court for an order that Chevron be prohibited from any reference to, evidence of, or argument "suggesting that Chevron's liability should be reduced because Plaintiff has received compensation in the form of funding or financial support for a water treatment plant from any collateral source."[1] These are very different requests. In the first instance, YSPUC seeks to exclude ***all*** evidence related to its receipt of funding from the DWTRF—a very broad category that encompasses relevant evidence that is not related to a reduction of Chevron's liability. On the other hand, YSPUC also requests an order preventing evidence or argument that Chevron's liability should be reduced by payments YSPUC received from the DWTRF. Though YSPUC is inconsistent, both categories of evidence are admissible.

In this case, YSPUC seeks almost $3.5 million in damages for the design and construction of the Plant[2] and according to its expert reports nearly $50 million in future damages. *See* YSPUC Supp. Resp. to Chevron Second Set of Interrog. at Ex. A, attached as Exhibit 1 to the Declaration of Charles C. Correll, Jr. ("Correll Decl."). *See also* Deposition of K. Harrington (Vol. 2) at 336:11-23, Correll Decl., Ex. 2. Throughout the design and construction of the Plant, YSPUC and the DWTRF engaged in an iterative process, which involved discussion of treatment options, YSPUC's draft submittals to the DWTRF, YSPUC's claim submittals for the DWTRF's review and the analysis of those submittals, and the DWTRF's decisions to pay or not to pay for those submittals. Indeed, YSPUC consulted with and relied on the DWTRF in designing and constructing the Plant—if a piece of that design or construction would not be approved by the DWTRF, then YSPUC did not include it. The DWTRF also made determinations of what aspects of the Plant were in its opinion reasonable and necessary, and communications between DWTRF employees and YSPUC debate those very issues. In the end, the DWTRF apparently denied significant amounts of YSPUC's claims. *See* YSPUC Resp. to Chevron Second Set of Interrog. at No. 2, Correll Decl., Ex. 3 (stating that the DWTRF had paid approximately $2.8 million for the Plant). Thus, evidence related to the DWTRF encompasses much more than just the payments it made to YSPUC.

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[1] YSPUC's proposed order seeks the relief outlined in its conclusion: that Chevron be prohibited from any reference to, evidence of, or argument "suggesting that Chevron's liability should be reduced because Plaintiff has received compensation in the form of funding or financial support for a water treatment plant from any collateral source." But YSPUC also includes the statement that the "evidence of . . . the DWTRF is not relevant." This statement is in no way supported by YSPUC's brief, which is limited solely to a discussion of the application of the collateral source rule to the DWTRF. In any event, evidence related to the DWTRF is highly relevant, as described further in Chevron's Response.

[2] YSPUC seeks damages for money that it paid to DWTRF employees for administering the DWTRF. *See* YSPUC Supp. Resp. to Chevron Second Set of Interrog. at Ex. A, attached as Exhibit 1 to the Declaration of Charles C. Correll, Jr. ("Correll Decl."). This demonstrates how broad and unworkable YSPUC's request that ***all*** evidence regarding the DWTRF be excluded. By seeking these damages, YSPUC has clearly put the DWTRF at issue. Plus, the DWTRF manager, Gary Hoffmann, testified that the DWTRF had to provide more guidance than usual to YSPUC. Deposition of G. Hoffmann (Vol. 1) at 232:5-234:19, Correll Decl., Ex. 4. These costs are thus in dispute.

Evidence about the process of designing the Plant with the DWTRF, the payments YSPUC ultimately received from the DWTRF, the claims the DWTRF denied, the relationship between the DWTRF and YSPUC, and YSPUC's agreement with its consultant, Rey Rodriguez, which was based on DWTRF reimbursements, is relevant and admissible for the reasons set forth in Section IV, *infra* (hereinafter, the "DWTRF Evidence").

## III. YSPUC'S MOTION IN LIMINE IS PREMATURE, AND THIS COURT SHOULD DEFER TO THE TRIAL COURT UPON REMAND.

Now is not the appropriate time for a motion in limine. Motions in limine are used to ensure the evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible for any purpose. *See Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997). Evidentiary rulings, especially those addressing broad classes of evidence—like all evidence related to the DWTRF—should often be deferred ***until trial*** so that questions of foundation, relevancy and potential prejudice can be resolved in proper context. *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). YSPUC's Motion involves the admissibility of case-specific evidence that should be brought on the eve of trial (if at all) and it should be decided at that time by the trial court. YSPUC's Motion is not a pretrial matter, and even if it was, it is not contemplated that a transferee court will complete *all* pretrial proceedings in all actions transferred and assigned to it. *In re Multidistrict Civil Actions Involving Air Crash Disaster*, 386 F. Supp. 908, 909 (Jud. Pan. Mult. Lit. 1975) (explaining that a transferee judge will not necessarily complete all pretrial proceedings, but instead common pretrial proceedings and those that are otherwise appropriate). Indeed, YSPUC's Motion is the type that should be heard by the trial court because it hinges on case-specific evidentiary matters as described herein. *See In re Nuvaring Products Liability Litigation*, 2009 WL 4825170, No. 4:08MD1964 RWS, at *2 (E.D. Mo. Dec. 11, 2009) ("[T]he transferee court typically does not rule on cumbersome, case-specific legal issues."). And even if the Court were to grant YSPUC's motion in limine, the trial court would be free to undo this ruling once the evidence developed further. *See Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342 (9th Cir. 1985).

This case is nowhere near trial. YSPUC's Motion comes before trial has been set, before this case has been remanded to federal court in California, and even before discovery has been completed. Because it is so premature, Chevron requests that the Court deny YSPUC's Motion and allow Chevron to continue developing the DWTRF Evidence. In the alternative, Chevron requests that the Court defer its ruling until a time closer to trial so that questions of foundation, relevancy and potential prejudice can be resolved in proper context. *See Starling v. Union Pac. R.R.*, 203 F.R.D. 468, 482 (D. Kan. 2001) (explaining that "it is the better practice to wait until trial to rule on objections when admissibility substantially depends upon what facts may be developed there”).

## IV. THE DWTRF EVIDENCE IS ADMISSIBLE.

The collateral source rule “operates both as a substantive rule of damages and as a rule of evidence.” *Arambula v. Wells*, 72 Cal. App. 4th 1006, 1015 (1999). To exclude the DWTRF Evidence, YSPUC relies entirely on the substantive rule of damages—that payment a plaintiff receives from a source ***independent*** of a defendant should not be deducted from that plaintiff’s damages. *Smock v. State*, 41 Cal. Rptr. 3d 857, 859 (2006). The DWTRF is not a source ***independent*** of Chevron, and thus evidence related to the DWTRF’s payments to YSPUC is not inadmissible on that basis. But regardless of the substantive rule, the DWTRF Evidence—evidence of the DWTRF payments and evidence related to the DWTRF process—is admissible on other grounds.

### *A. The DWTRF Evidence is Admissible for Other Valid Purposes.*

“The Federal Rules of Evidence[3] favor the admission of all relevant evidence.” *King v. City of New York*, 2007 WL 1711769, No. 06 Civ. 6516 (SAS), at *1 (S.D.N.Y. June 13, 2007). Indeed, “[a] district court will exclude evidence on a motion in limine only when the evidence is clearly inadmissible on all potential grounds.” *Id.* The DWTRF Evidence is not clearly inadmissible on all potential grounds, and the mere fact that the DWTRF ***could*** be a collateral source (which Chevron disputes) does not make the DWTRF Evidence inadmissible if it is relevant to other contested issues. *See England v. Reinaur Transp. Co., L.P.*, 194 F.3d 265, (1st Cir. 1999); *Timmons v. UPS, Inc.*, 2010 WL 2464869 (E.D. Cal. June 14, 2010) (holding that collateral source rule can not be used to bar introduction of collateral source evidence when introduced not to show benefits received, but for another valid purpose).

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[3] The Federal Rules of Evidence apply to evidentiary questions of whether collateral source evidence is admissible. *Fitzgerald v. Expressway Sewerage Const. Inc.*, 177 F.3d 71, 74 (1st Cir. 1999).

Relevant evidence is that having any tendency to make the existence of a fact that is of consequence more or less probable, and all relevant evidence is originally admissible. FED. R. EVID. 401; 402. Courts liberally interpret this definition: "The standard of relevancy is not strict." *U.S. v. Miranda-Uriarte*, 649 F.2d 1345, 1353 (9th Cir. 1981).

"Evidence of collateral source payments is admissible under the Federal Rules of Evidence unless its probative value is substantially outweighed by the danger of unfair prejudice." *Quintero v. United States*, 2010 WL 5071045, No. 1:08-cv-01890-OWW-SMS, at * 7 (E.D. Cal. Dec. 7, 2010). But "unfair prejudice" does not occur merely because evidence might hurt a party's case. *See Dollar v. Long Mfg., N.C., Inc*., 561 F.2d 613, 618 (5th Cir. 1977) ("Of course, "unfair prejudice" as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party") (cited by *Perry v. Ethan Allen, Inc*., 115 F3d 143, 151 (2nd Cir. 1997)). Evidence is only prejudicially unfair if it has an "undue tendency to suggest decision on an improper basis." *Perry*, 115 F.3d at 151.

The DWTRF Evidence has substantial probative value for purposes other than reducing claimed damages, including to establish the costs incurred by YSPUC for the Plant, to aid in the determination of the reasonableness of those costs, to impeach YSPUC's witnesses, and to evaluate punitive damages. Moreover, the DWTRF Evidence will not create any unfair prejudice for YSPUC—it will not suggest a decision on an improper basis, but instead will facilitate a full inquiry into YSPUC's claims. For these reasons—among others—the DWTRF Evidence is admissible and the Court should deny YSPUC's Motion.

**1. The DWTRF Evidence is Relevant to a Number of Contested Issues.**

**a. The DWTRF Evidence Establishes the Costs YSPUC Incurred.**

The DWTRF Evidence is relevant to show the actual amount of money that YSPUC expended or incurred in designing and constructing the Plant. In California, a plaintiff is "entitled to recover up to and no more than the actual amount expended or incurred" for damages. *See Hanif v. Housing Authority*, 200 Cal.App.3d 635, 643 (1988). *See also Cabrera v. E. Rojas Props., Inc.*, 2011 WL 386840, at *3 (Cal. Ct. App. Feb. 8, 2011) ("[N]o suggestion that [plaintiff] was at any time liable for the amounts billed by her medical providers as their usual and customary charges."). The California Supreme Court further articulated this rule in a recent decision that allowed the admission of collateral source evidence, explaining that "[s]uch sums are not damages the plaintiff would otherwise have collected from the defendant. They are neither paid to the providers on the plaintiff's behalf nor paid to the plaintiff in indemnity of his or her expenses." *Howell v. Hamilton Meats & Provisions, Inc.*, 2011 WL 3611940, No. S179115, at *1 (Cal. Aug. 18, 2011).

Here, Rey Rodriguez, YSPUC's consultant, agreed to be paid ***only*** what the DWTRF reimbursed YSPUC. *See* YSPUC Board Memo (Aug. 14, 2001), Correll Decl., Ex. 5. YSPUC's corporate representative, Ken Harrington, confirmed this arrangement:

Q. Do you recall whether or not H2O.R2 was the lowest bidder, if you will?

A. I believe they presented the board with the—I don't know if you call it lowest bid. I think the scope of work and cost-benefit that the board felt was in our best interest.

Q. Do you remember what that cost-benefit was that the board felt was in the best interests of the utility company?

A. That H2O.R2 had offered that any cost incurred by them that was not approved and funded through the reimbursement process, they would waive those costs to the utility company.

Q. Has any of H2O.R2's costs incurred not been reimbursed by the fund?

A. Yes.

Q. And has H2O.R2 waived those costs?

A. Yes.

Harrington Dep. (Vol.1) at 31:15-32:16, Correll Decl., Ex. 2.[4] Thus, all that YSPUC will have to pay Mr. Rodriguez for designing, constructing, and operating the Plant is the amount that it receives from the DWTRF. As such, YSPUC has no liability for the amounts that the DWTRF refused to reimburse for Mr. Rodriguez's work, and thus has not incurred any damages for those amounts not reimbursed for Mr. Rodriguez. The court in *Howell* confirmed this proposition ***and*** admitted similar collateral source evidence to establish the plaintiff's damages, explaining that "[h]aving never incurred the full bill, plaintiff could not recover it in damages for economic loss, [and] [f]or this reason alone, the collateral source rule would be inapplicable." *Howell*, 2011 WL 3611940 at *12.[5] The DWTRF Evidence is critical to determining what costs YSPUC has actually incurred for the Plant. Because the DWTRF Evidence is relevant to show the costs incurred by YSPUC for Mr. Rodriguez's work, it is admissible for a purpose outside of the collateral source rule.

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4 Mr. Harrington later added that Mr. Rodriguez never provided written confirmation that he had "forgiven" payments that were not reimbursed by the DWTRF. But Mr. Harrington—YSPUC's corporate representative—confirmed that that Mr. Rodriguez had not submitted any payment request for those refused funds and that he did not expect Mr. Rodriguez to ultimately request such payment. Harrington Dep. (Vol. 1), Correll Decl., Ex. 2 at 53:19-55:5.

5 The Howell court also cited the Restatement (Second) of Torts rule to support its holding: "While the measure of recovery for the costs and services a third party renders is ordinarily the reasonable value of those services, ***'if … the injured person paid less than the exchange rate, he can recover no more than the amount paid***, except when the low rate was intended as a gift to him." *Howell*, 2011 WL 3611940 at *12 (citing Rest.2d Torts § 911, cmt. h) (emphasis and ellipses in original).

### b. The DWTRF Determined Certain Costs of the Plant Were Not Reasonable.

The DWTRF Evidence is also relevant to the contested issue of whether the cost of the Plant was reasonable. Indeed, in California "[d]amages must, in all cases, be reasonable[.]" CAL. CIV. CODE § 3359. YSPUC seeks damages from Chevron for the cost of the Plant in the amount of $3.5 million. *See* YSPUC Supp. Resp. to Chevron Second Set of Interrog. at Ex. A, Correll Decl., Ex. 1. The DWTRF Evidence, including evidence of what claims the DWTRF denied because it determined that they were not caused by MTBE contamination or were not reasonable, are relevant to prove YSPUC's claims here are not reasonable. *See* FED. R. EVID. 401.

In *Quintero v. U.S.*, the Eastern District of California considered similar "collateral source" evidence and admitted it. 2010 WL 5071045 at *8 (E.D. Cal. Dec. 7, 2010). There, the court allowed evidence of actual amounts paid for the plaintiff's medical care for the purpose of "ascertaining the reasonable value of the medical services provided." *Id*. In *Quintero*, the evidence of the amounts actually paid were the only evidence of the value of the services ***"other than the billed amounts, which the court found were unduly inflated."*** *Id.* (emphasis added). The court further explained its ruling: "The evidence of the amounts paid in full satisfaction of [the plaintiff's] medical debts was properly admitted under" the Federal Rules of Evidence "to show the value of the services and not as bearing on the actual loss qua damages." *Id.*

The use of collateral source evidence for this purpose was also confirmed by a California court in *Smalley v. Baty*, 128 Cal. App. 4th 977, 984 (2005). There, the court found error in excluding collateral source evidence to prove that a plaintiff had paid his own medical bills. *Id*. at 985. The court explained that this evidence was "manifestly relevant to [the plaintiff's] claim for damages." *Id*. at 984. Specifically, the court found that the existence of a bill and whether it had been paid was evidence of whether that bill was reasonable:

> A bill or request for payment is evidence of the amount of the expense, and ***evidence that the bill was paid is evidence that the charge was reasonable***. . . . In some instances, on the other hand, ***evidence that a medical bill was not paid may be introduced to show that the amount charged was unreasonable***.

*Id*. (ellipses and emphasis in original).

Here, YSPUC relied on the DWTRF for its determinations of what costs were reasonable for the Plant and which ones were not. The DWTRF's approvals and denials of payment for certain tasks and design elements of the Plant are therefore relevant evaluate whether the cost of designing and constructing the Plant was reasonable. Indeed, Ken Harrington, YSPUC's corporate representative, testified that he did not did ***not*** review invoices from Mr. Rodriguez for reasonableness—he just checked to see if they were complete and sent them to the DWTRF. Harrington Dep. (Vol. 2) at 340:24-341:24, Correll Decl., Ex. 2. And no one else at YSPUC oversaw or reviewed the design and work done on the Plant. Harrington Dep. (Vol. 2) at 396:15-22, Correll Decl., Ex. 2. It was therefore the DWTRF—and only the DWTRF—that evaluated the invoices submitted by YSPUC for reasonableness and necessity. In fact, the DWTRF found that some submitted by Mr. Rodriguez were fraudulent. Email from G. Hoffmann to L. Walker (Apr. 8, 2005), Correll Decl., Ex. 6. It found others—like those in which Mr. Rodriguez charged $120 per hour despite the fact that he was not a licensed engineer—unreasonable. Coordination Mtg. Min. (Aug. 29, 2002), Correll Decl., Ex. 7. The DWTRF's analysis of whether the cost of the Plant was unreasonable is reflected in its denials of YSPUC's payment requests, and thus those responses are clearly relevant evidence as to whether YSPUC's claims here are reasonable, because they are the same costs. This evidence cannot be excluded.

### c. The DWTRF Drove YSPUC's Design Decisions for the Plant and Whether it Mitigated Its Damages.

One reason, if not the only reason, YSPUC chose to build an expensive treatment system instead of using a more cost effective system such as an off-the-shelf skid-mounted ready system, was because someone else was paying for it. Chevron is entitled to show why YSPUC acted as it did for, among other reasons, mitigation of damages; otherwise, YSPUC will be allowed to present a complete fiction to the jury, implying that it was spending its own money and invoking the presumption that one reasonably manages one's own account, when in fact YSPUC was spending another's money without any regard for the reasonableness of the expenses incurred.

Discovery has revealed that YSPUC had a "clearing account," in which it placed invoices and did not pay vendors until the DWTRF paid those costs—it only paid vendors what the DWTRF paid. Harrington Dep. (Vol. 3) at 473:25-476:13, Correll Decl., Ex. 2 (explaining the operation of YSPUC's "clearing account" for the Plant). Indeed, Mr. Rodriguez has yet to receive anything over and above what the DWTRF has reimbursed YSPUC—Mr. Harrington testified that the check YSPUC would send to Mr. Rodriguez was "equal to the penny to the money we received from the Fund." Harrington Dep. (Vol. 2) at 343:17-344:4, Correll Decl., Ex. 2. Thus, YSPUC had no reason to monitor costs and every incentive to obtain the most expensive treatment system it could, which is exactly the opposite incentive one has when spending one's own money. Had it been spending its own money, it would not have embarked on the building a costly treatment plant that recent monitoring reveals is not even needed.

#### d. YSPUC Made Certain Relevant Representations in its Application to the DWTRF.

YSPUC applied to the DWTRF for money in response to MTBE detections. What YSPUC told the DWTRF about the alleged contamination to secure and maintain that funding is relevant to its claims against Chevron. For example, representations made by YSPUC on funding applications regarding the proposed cost of the Plant are relevant to what YSPUC claims those costs are in this litigation. *See Timmons v. UPS, Inc.*, 2010 WL 2464869 at *2 (E.D. Cal. June 14, 2010.

In fact, the Eastern District Court of California encountered this very issue in *Timmons v. UPS, Inc*. There, the plaintiff sought to exclude the defendant, UPS, from introducing "*any* evidence or testimony concerning payments received by Plaintiff from any collateral source[.]" *Id*. at *1. UPS opposed the motion and argued that it intended to introduce evidence of the plaintiff's disability benefits "for reasons completely independent from any damages calculation." *Id*. at *2. The court found that evidence that the plaintiff was receiving disability benefits based on representations that he could not perform duties attendant to his job as a delivery driver was admissible. *Id*. The court held that "it would appear inappropriate to exclude anything pertaining to collateral source given UPS' claim that during the disability benefits application process both Plaintiff and his physicians made certain representations about his condition that would otherwise be relevant." *Id*. Consequently, the court denied the plaintiff's motion as an "overbroad sweep." *Id*. Here, the representations made by YSPUC on its applications to the DWTRF to obtain funding are relevant, for example, to explore the reasons why YSPUC elected to design and build the Plant, as opposed to using some other, more cost effective method of treatment, when considering, among other things, Chevron's defense that YSPUC did not mitigate its damages.

### e. The DWTRF Evidence is Relevant to YSPUC's Punitive Damages Claim.

YSPUC claims generally that Chevron knew or should have known that MTBE-gasoline would be released into the environment because the gasoline stations receiving that gasoline placed "the gasoline in inadequate and leaking gasoline delivery systems." Comp., ¶ 33. YSPUC further alleges that Chevron breached its duties by "negligently, recklessly and/or carelessly, placing or permitting gasoline containing MTBE to be placed into leaky gasoline delivery systems which spilled, leaked, discharged, and/or release gasoline containing MTBE[.]" Comp., ¶ 86. Based on Chevron's alleged lack of due care in this regard, YSPUC claims that Chevron "knew or should have known" that substantial quantities of MTBE-gasoline would be released and that Chevron had a reckless disregard for "the consequences of the known leakage of gasoline containing MTBE from the gasoline delivery systems," and therefore YSPUC is entitled to punitive damages. Comp., ¶ ¶91-92.

In response to these allegations, Chevron is entitled to show that there were programs and procedures in place, like the DWTRF, to pay for the clean up of MTBE-gasoline releases and to treat MTBE-contaminated wells in the rare event that a well was in fact impacted.[6] YSPUC has put Chevron's alleged knowledge of "leaky" underground storage tanks at issue and has sought punitive damages based on Chevron's allegedly willful delivery of gasoline to those leaky tanks. Evidence that the DWTRF existed and moreover, that Chevron knew about it and contributed to it, and that YSPUC received funds from it for its Plant, is thus relevant and necessary to defend against YSPUC's allegations that Chevron should be punished for allegedly delivering MTBE-gasoline to the relevant station. In other words, if YSPUC is allowed to argue that Chevron

[6] Mr. Hoffmann, the manager of the DWTRF, testified that less than ten public water providers ever applied to the DWTRF for funding related to MTBE contamination. *See* Hoffmann Dep. (Vol. 2) at 335:13-336:8, Correll Decl., Ex. 4.

knew or should have known that MTBE would be released into the environment, Chevron is entitled to prove that it contributed to programs in place to minimize any harm caused thereby.

**2. The DWTRF Evidence Is Relevant (and Admissible) to Impeach YSPUC Witnesses.**

Federal Rule of Evidence 607 provides that the credibility of a witness may be attacked by any party; and Rule 608 explains impeachment may be based on opinion or reputation evidence or specific instances of conduct (without the use of extrinsic evidence). FED. R. EVID. 607, 608. Further, California courts routinely allow collateral source evidence if it is used to impeach a witness. *See, e.g., McKinney v. Cal. Portland Cement Co.*, 96 Cal. App. 4th 1214, 1223 (2002) ("exceptions to the rule of exclusion," including impeachment). *See also Arambula v. Wells*, 72 Cal. App. 4th 1006, 1015 (1999) (holding that collateral source evidence may be admissible to impeach "claimed inability not to work.").

Here, the DWTRF Evidence is admissible to impeach the credibility of YSPUC witnesses for at least three reasons. ***First***, the DWTRF Evidence is admissible to impeach Mr. Rodriguez. YSPUC had a contingent agreement with Mr. Rodriguez, where he agreed to be paid only what the DWTRF reimbursed. *See* YSPUC Board Memo (Aug. 14, 2001), Correll Decl., Ex. 5. *See also* Harrington Dep. (Vol.1) at 31:21-32:16, Correll Decl., Ex. 2. This provided an incentive for Mr. Rodriguez to overbill the DWTRF and for YSPUC to let him do so. Moreover, employees of the DWTRF questioned Mr. Rodriguez's payment requests to the DWTRF, specifically noting that Mr. Rodriguez overbilled or engaged in fraudulent billing. Email from G. Hoffmann to L. Walker (Apr. 8, 2005), Correll Decl., Ex. 6. This evidence, which will necessarily include reference to payments from the DWTRF, is relevant to impeach the credibility of Mr. Rodriguez, and in particular, his statements about what it cost to design and build the Plant.

***Second***, the DWTRF Evidence, and specifically those YSPUC payment submittals rejected by the DWTRF as too expensive and the DWTRF's comments regarding the same, are admissible to show YSPUC's attitude toward the Plant (and impeach on that basis). The DWTRF Evidence demonstrates the DWTRF's opinion that YSPUC understood that its costs would be paid by the DWTRF and that YSPUC was therefore careless during the project. *See, e.g.*, Email from G. Hoffmann to G. Yamamoto (Apr. 2, 2002), Correll Decl., Ex. 8. Such evidence is relevant to impeach YSPUC on the reasonableness of the cost of the Plant.

Likewise, the DWTRF Evidence is admissible to show that YSPUC engaged in conduct designed to exaggerate the seriousness of its injuries. Here, YSPUC exaggerated the cost of the Plant to get more money from the source—DWTRF. Such evidence, including evidence of the alleged collateral source payments, is admissible to impeach YSPUC. *McGrath v. Consolidated Rail Corp*., 136 F.3d 838, 841 (1st Cir. 1998) (upholding admission of collateral source payments offered to show plaintiff's lack of motivation for returning to work). *See also Duc Van Nguyen v. Shalala*, 1994 WL 362263 at *5, n. 2 (N.D. Cal. Feb. 1, 1994) (finding that collateral source evidence is "routinely admitted for purposes of impeachment" when there is a suspicion of malingering).

***Third***, Chevron expects that YSPUC's witnesses will testify that its costs for the design and construction of the Plant were reasonable and necessary. Evidence of the DWTRF's denial of those costs is necessary to impeach such testimony, particularly given Mr. Harrington's statement that he relied on the DWTRF for such decisions. *Dorn v. Burlington N. Santa Fe RR Co.*, 397 F.3d 1183, 1193 (9th Cir. 2005) ("Of course, [i]mpeachment by contradiction is authorized by Rule 607."). Because evidence related to the DWTRF Evidence is relevant to impeach YSPUC witnesses (and its consultant Mr. Rodriguez in particular), it should not be excluded.

### *B. Payments to the DWTRF Are Not Subject to the Collateral Source Rule, and Are Thus Admissible.*[7]

YSPUC argues that Chevron should be prohibited from using the DWTRF Evidence because it is subject to the collateral source rule. Despite its other relevant purposes, this evidence does not fall within the ambit of collateral source because the DWTRF is not wholly independent from Chevron. Therefore, YSPUC cannot obtain the double recovery it seeks here.

The collateral source rule provides that "if a plaintiff receives some compensation for his injuries from a source ***wholly independent*** of the defendant, such payment should not be deducted from the damages the plaintiff would otherwise collect from the defendant." *Smock v. State*, 41 Cal. Rptr. 3d 857, 859 (2006) (emphasis added). "An independent collateral source is most often obtained as a result of the plaintiff's actual or constructive payment and planning." *McKinney v. Cal. Portland Cement Co.*, 96 Cal. App. 4th 1214, 1223 (2002). Thus, the rule applies to payments (active or constructive) by the injured parties to insurance companies, retirement plans, disability benefits, etc.—not payments made to a fund by a defendant. *See, e.g., McKinney*, 96 Cal. App. 4th at 1222.

Indeed, the cases cited by YSPUC confirm this basic principle—they are cases where the payments at issue were either made to a source funded in part by the plaintiff or from a gratuitous source not connected with a defendant.[8] More analogous case law supports the substantive admissibility of the DWTRF Evidence. For example, the court in *Scott v. County of Los Angeles* found a plaintiff's receipt of payments from a defendant's insurance carrier did not implicate the collateral source rule. 27 Cal.App.4th 125, 154 (1994).

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[7] YSPUC challenges the admissibility of evidence of funding from the DWTRF, not evidence of payments ***denied***. The collateral source rule contemplates only the exclusion of benefits received, and as such, evidence of the DWTRF's denials of payments should not be subject to this rule. *See Howell v. Hamilton Meats & Provisions, Inc.*, 2011 WL 3611940, No. S179115 at *14 (Cal. Aug. 18, 2011) (finding that the collateral source rule does "not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover").

In *Scott*, the plaintiff was a child under the supervision of Los Angeles County, who sued the County after sustaining injuries in foster care. *Id*. at 133. The County sought to introduce evidence that the plaintiff's injuries had been paid for, in part, by the County's Foster Care insurance. *Id*. at 154. The court found that "evidence of any payments that were made from insurance purchased by the County to cover its foster care program should have been admitted." *Id.* This, the court explained, was because the collateral source rule does not apply to funds from the defendant personally or from the defendant's insurance carrier. *Id*.

The DWTRF is not independent from Chevron. Chevron contributes to the DWTRF via its contributions to the Underground Storage Tank Cleanup Fund (the "UST Fund"). *See* Declaration of Frank G. Soler, attached hereto. Pursuant to California law, UST owners and operators—like Chevron—provide money to the UST Fund to meet state requirements that they maintain financial responsibility to pay for any damages arising from their tank operations. CAL. HEALTH & SAFETY CODE §§ 25299.10, 25299.30. Indeed, this financial responsibility is required "for taking corrective action ***and compensating third parties for bodily injury and property damage*** arising from operating an underground storage tank." CAL. HEALTH & SAFETY

[8] *Maggio, Inc. v. United Farm Workers of Am., AFL-CIO* addressed a "fund" created by the plaintiff farmers to reimburse themselves in the instance of a strike. 227 Cal. App. 3d 847 (1991). *Arambula v. Wells* applied the collateral source rule to gratuitous payments. 72 Cal. App. 4th 1006 (1999). *McQuillian v. S. Pac. Co.* applied the collateral source rule to retirement system payments. 40 Cal. App. 3d 802 (1974). And *Philip Chang & Sons Assoc. v. La Casa Novato* dealt with constructive payments made ***by the plaintiff*** to a government fund. 177 Cal. App. 3d 159, 169 (1986).

CODE §25299.31 (emphasis added). Five million dollars of funds from the UST Fund are used to administer the DWTRF. CAL. HEALTH & SAFETY CODE § 25299.99(a) (1998) (explaining that $5 million from the UST Fund may be expended by the DWTRF). *See also* Hoffmann Dep., Correll Decl., Ex. 4 at 27:12-28:1; 334:20-24 (explaining that money from the DWTRF came from the UST Fund).

YSPUC argues that the collateral source rule applies to Chevron's contributions to the UST Fund because the intended purpose of the UST Fund (according to YSPUC) is "not to insure Chevron against suits of this type," but to pay for corrective action at the release site. Mtn. at 4. Corrective action is not the only goal of the UST Fund, however. Indeed, the UST Fund is for corrective action ***and*** for "compensating third parties for bodily injury and property damage arising from operating an underground storage tank." CAL. HEALTH & SAFETY CODE § 25299.31. As the Program Summary for the UST Fund further explains: "If a UST leaks, the owner and operator ***may be faced with high cleanup costs or with lawsuits brought by third parties. Financial responsibility requirements ensure that money will be available to meet these costs.*** " STATE WATER RES. CONT. BD., DIV. OF FIN. ASSISTANCE, *Underground Storage Tank Cleanup Fund Program Summary*, pg. 8 (Jan. 2008), Correll Decl., Ex. 9 (emphasis added). Thus, the UST Fund contemplates the use of Chevron's contributions to pay for lawsuits brought by third parties. In fact, Chevron and other UST owners contribute to the UST Fund for the very situation existing here—if water providers encounter MTBE contamination, then a fund exists to assist those water providers, which reduces the costs a water system incurs. Likewise, the DWTRF is designed to address any injuries suffered by water systems from oxygenate impacts, including MTBE, and Chevron contributes to this fund through its contributions to the UST

Fund. *See* Hoffmann Dep. (Vol. 1), Correll Decl., Ex. 4 at 23:17-24:4 (explaining the purpose of the DWTRF).

*Russo v. Matson Navigation*, cited by YSPUC, does not change this fact. Mtn. at 5. In *Russo*, the defendant sought to introduce evidence of the plaintiff's pension benefits. 486 F.2d 1018, 1019 (9th Cir. 1973). The court found that the nature of the pension plan at issue was a fringe benefit for the plaintiff based on his contractual agreement with his employer/the defendant. *Id*. at 1021. The pension plan was not for the purposes of providing funds to account for the defendant's liability to the plaintiff for his injuries. *Id*.

That is not the situation here—this is not a case where a plaintiff "has invested years of insurance premiums to assure his medical care," and should thus receive the benefit of his thrift. *See Helfend v. S. Cal. Rapid Transit Dist.*, 2 Cal. 3d, 1, 10 (1970). It is just the opposite. Chevron, ***the defendant***, has contributed to a fund that is designed to help pay third-party costs based on releases of gasoline containing any MTBE. Accordingly, the collateral source rule should not apply to payments received by YSPUC from the DWTRF.[9]

But even if the DWTRF were independent from Chevron, the collateral source rule should not apply to prevent a reduction in YSPUC's damages to that which was paid by the DWTRF for Mr. Rodriguez's costs as opposed to what was billed to YSPUC by Mr. Rodriguez or any evidence related to such reduction. The court in *Cabrera v. E. Rojas Properties, Inc.*, addressed this issue and held that the collateral source rule did not prevent such a reduction. 2011 WL 386840, No. at *2 (Cal. App. 2nd Dist. Feb. 8, 2011). There, the court reduced the

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9 Further, any "discount" that YSPUC may have received by Mr. Rodriguez accepting only that which the DWTRF reimbursed is not a benefit to YSPUC that is therefore subject to the collateral source rule. Indeed, the *Howell* court rejected this argument. There, the court held that a "negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or here injuries and therefore does not come within the rule." *Howell*, 2011 WL 3611940 at *14.

plaintiff's damages to the amount that her insurer (the collateral source) actually paid. *Id.* In California, an injury plaintiff in a tort action "cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum." *Id*. at *3. The court in *Cabrera* found that "there was no suggestion that the plaintiff was at any time liable for the amounts billed by her medical providers as their usual and customary charges." *Id*. at *4. The damages reduction upheld by the court, therefore, was not based on any compensation received by the plaintiff from a collateral source. *Id.*

This rule was confirmed by the California Supreme Court's decision in *Howell*, where the court allowed a reduction in the plaintiff's damages to that which was actually incurred and further held that the collateral source rule did "not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover." *Howell v. Hamilton Meats & Provisions, Inc*., 2011 WL 3611940, No. S179115, at *12 (Cal. Aug. 18, 2011). As the *Howell* court explained, "the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay." *Id.*

Likewise, the maximum amount of damages (if any) YSPUC can recover for Mr. Rodriguez's work should be limited to the amount reimbursed by the DWTRF for that work, and thus evidence to establish those payments is admissible. Under *Cabrera and Howell,* YSPUC cannot recover more than the amount it has actually paid or incurred, and here pursuant to its contingent agreement with Mr. Rodriguez, YSPUC has only paid or incurred what the DWTRF has agreed to pay him.

## V. ANY RULING ON A MOTION IN LIMINE SHOULD NOT PROHIBIT CHEVRON'S PROPER DISCOVERY.

If the Court grants YSPUC's Motion, Chevron requests that such ruling not be used to prevent Chevron from continuing discovery on those issues. Chevron and YSPUC are in the middle of discovery, with expert discovery just beginning on August 2, 2011. During the discovery phase of a case, Federal Rule of Civil Procedure 26 allows the discovery of all information that is "reasonably calculated to lead to the discovery of admissible evidence" and is not concerned with whether the evidence will be admissible at trial. FED. R. CIV. P. 26(b)(1). *See also U.S. v. Meyer*, 398 F.2d 66, 76 (1968) ("[D]iscovery is not limited to evidence admissible at trial."); *McQuade v. Michael Gassner Mechanical & Elec.*, 587 F.Supp. 1183, 1190 (D. Conn. 1984) ("The possible inadmissibility of the tape recordings at trial is not an adequate reason to foreclose discovery of them.").

It is too soon to tell what will be admissible at trial and why—all of the evidence in the case has not yet come to light. The DWTRF Evidence is admissible for the reasons set forth above in Sections A-B, but even if the Court determines it is not, this evidence is certainly discoverable. *See* FED. R. EVID. 402; FED. R. CIV. P. 26(b). At this point, a motion in limine could prevent Chevron from engaging in discovery that meets the standard set forth in the Federal Rules, violating the very purpose of discovery in the first place—"to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." *U.S. ex rel Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002). Accordingly, if the Court should grant YSPUC's Motion, then Chevron requests that the Court refuse to apply that order to ongoing discovery.

## V. CONCLUSION

YSPUC seeks a double recovery—to be paid ***twice*** for the same costs. And it asks for this windfall while discovery is still ongoing. Indeed, YSPUC's Motion is premature because this case is nowhere near trial and questions of foundation, relevancy, and any potential prejudice of the DWTRF Evidence have yet to fully determined. The trial court should evaluate these issues at the time of trial and can issue a limiting instruction at that time if any is warranted. But even at this early stage, it is clear that the DWTRF Evidence is relevant for a number of reasons outside of simply reducing Chevron's liability. This evidence is relevant to show the damages incurred by YSPUC and to show the reasonableness of those damages. The DWTRF Evidence is also highly probative to impeach YSPUC witnesses on the design of the Plant, among other issues. Finally, the DWTRF is not a collateral source because it is not independent from Chevron, and thus the collateral source rule does not substantively apply to preclude any evidence of payments to YSPUC from the DWTRF. For these reasons, Chevron requests that the Court deny YSPUC's Motion.

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Respectfully submitted,
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**Certificate of Service**

I hereby certify that on the 25th day of August 2011, a true, correct, and exact copy of the foregoing document was served on all counsel via LexisNexis File & Serve.

/s/ Elizabeth R. Taber
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